

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 12

Docket No. CB-7121-10-0016-V-2

**Kimberly Hollingsworth,
Appellant,**

v.

**Department of Commerce,
Agency.**

February 1, 2012

Stephanie M. Herrera, Esquire, and Gary M. Gilbert, Esquire, Silver Spring, Maryland, for the appellant.

Kardesha N. Bradley, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 Pursuant to the Board's instructions, the administrative judge issued an April 6, 2011 recommendation on the appellant's request for compensatory damages. Considering that recommendation, and for the reasons set forth below, we AWARD the appellant \$6,463.50 in past pecuniary damages and \$15,000.00 in nonpecuniary damages.

BACKGROUND

¶2 The pertinent background for this case is set forth in the Board's Opinion and Order forwarding the matter to the regional office for an addendum proceeding on the issue of compensatory damages. *Hollingsworth v. Department of Commerce*, [115 M.S.P.R. 636](#), ¶¶ 2-5, 10 (2011). The arbitrator found that the agency failed to accommodate the appellant's disability and reversed the appellant's removal, but he denied the appellant's requests for compensatory damages and attorneys' fees without making any specific findings as to those claims. *See id.*, ¶¶ 3, 8. Because the arbitrator did not cite any legal standard or analytical framework in denying the appellant's requests for compensatory damages and attorney fees, we granted the appellant's request for review of the arbitrator's decision denying her compensatory damages and attorney fees, affirmed the remainder of the arbitrator's decision, and forwarded the compensatory damages claim¹ to the regional office. *Id.*, ¶¶ 8-10. The appellant declined a hearing on her compensatory damages request and asked for a decision on the written record. *Hollingsworth v. Department of Commerce*, MSPB Docket No. CB-7121-10-0016-P-1, (P-1 File), Tab 6. In her submission below, the appellant requested \$7,020.95 in pecuniary damages and \$150,000 in nonpecuniary damages. P-1 File, Tab 9 at 1. The agency responded in opposition, and the appellant filed a reply to the agency's response. P-1 File, Tabs 11-12.

¶3 The administrative judge found the appellant entitled to receive compensatory damages. P-1 File, Tab 13, Recommendation at 3. Based on the arbitrator's finding that the agency did not afford the appellant a reasonable accommodation as required by the Americans with Disabilities Act, the administrative judge determined that the agency was not entitled to the statutory

¹ Under 5 C.F.R. § 1201.203(d), the Board adjudicates a request for attorney fees after a final decision is issued.

exception precluding an award of damages when the covered entity demonstrates good faith efforts to identify and make a reasonable accommodation. *Id.*; see [42 U.S.C. § 1981a\(a\)\(3\)](#). The administrative judge recommended that the Board grant the appellant's request for pecuniary damages in the amount of \$6,463.50, representing expenses she incurred related to late fees, health insurance premiums, job search mileage, and a tax penalty she incurred as a result of withdrawing money from her Thrift Savings Plan (TSP). Recommendation at 5-7. The administrative judge further recommended that the Board award the appellant \$10,000 in nonpecuniary damages. *Id.* at 10-11. Per the Board's instructions, the administrative judge then returned the record to the Board for issuance of a final decision on the appellant's request for review of the arbitration decision and her request for compensatory damages. *Id.* at 11; *Hollingsworth*, [115 M.S.P.R. 636](#), ¶ 10; [5 C.F.R. § 1201.204\(h\)\(3\)](#).

ANALYSIS

¶4 Under the Civil Rights Act of 1991, in a case such as this, an employee may recover compensatory damages from a federal agency that engaged in unlawful and intentional discrimination against her on the basis of her disability. [42 U.S.C. § 1981a\(a\)\(2\)-\(3\)](#); e.g., *Hollingsworth*, [115 M.S.P.R. 636](#), ¶¶ 8-10; *Hocker v. Department of Transportation*, [63 M.S.P.R. 497](#), 504 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table). The Board may order the payment of compensatory damages when there has been a finding that such discrimination occurred. *Heffernan v. Department of Health & Human Services*, [107 M.S.P.R. 97](#), ¶ 5 (2007); [5 C.F.R. § 1201.202\(c\)](#). The Board has held that it will defer to and adopt the criteria used by the Equal Employment Opportunity Commission (EEOC) for proving both the entitlement to and the amount of compensatory damages. *Sloan v. U.S. Postal Service*, [77 M.S.P.R. 58](#), 70 (1997).

¶5 Section 102(a) of the Civil Rights Act authorizes the award of compensatory damages for pecuniary losses and for nonpecuniary losses, such as

emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief authorized by Title VII. To receive an award of compensatory damages, an appellant must demonstrate that she has been harmed as a result of the agency's discriminatory action and must establish the extent, nature, and severity of the harm, as well as the duration or expected duration of the harm. *Heffernan*, [107 M.S.P.R. 97](#), ¶ 6 (citing *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157, 1994 WL 652171, at *3 (July 22, 1994), *recons. denied*, EEOC Request No. 05940927, 1995 WL 744159 (Dec. 8, 1995)); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, 1992 WL 1364354, at 11-12, 14 (July 14, 1992) ("Guidance")).

¶6 Here, the agency's action was the appellant's removal. *See* P-1 File, Tab 9, Subtab 3. As indicated in the following discussion, we see no error in the administrative judge's determinations regarding the appellant's request for compensatory damages. Therefore, we have adopted her recommendation and award the appellant \$6,463.50 in pecuniary damages. However, we have increased the award for nonpecuniary damages to \$15,000.00. The basis for this award is explained below.

Pecuniary Damages

¶7 "Pecuniary damages are available for out of pocket expenses shown to be related to the discriminatory conduct." *See Minardi v. U.S. Postal Service*, EEOC Appeal No. 01981955, 2000 WL 33542026, at *2 (Oct. 3, 2000). These damages usually include reimbursement for medical, job hunting, and moving expenses, as well as other quantified out-of-pocket expenses. *Id.* The EEOC requires that claimants document these expenses, typically with receipts, bills, or physicians' statements. *Id.* Past pecuniary losses are ones that occur before a complaint is resolved and future pecuniary losses are losses likely to occur after a complaint is

resolved. *See* Guidance at *4-5. The appellant did not request payment for any future pecuniary losses.

¶8 The administrative judge recommended granting the appellant's request for reimbursement of payments she made for health insurance premiums, a late fee regarding health insurance premiums, job search mileage and a tax penalty for withdrawing money from her TSP. *See* Recommendation at 5-7. The administrative judge only recommended denying a very small portion of the appellant's pecuniary damages request. *See id.* Specifically, she recommended denying the appellant's request for reimbursement of late fees for telephone service and electricity because the appellant's evidence did not clearly indicate that she had actually paid any such late fees. *Id.* at 5; P-1 File, Tab 9, Subtabs 7c-7d. We agree with the administrative judge's assessment of the appellant's evidence. Recommendation at 5-7; *see* P-1 File, Tab 9, Subtabs 7c-7f, 7i-7j.

¶9 The administrative judge also denied the appellant's request to be reimbursed for certain medical expenses. Recommendation at 6 (citing *Keller v. U.S. Postal Service*, EEOC Appeal No. 01A34761, 2004 WL 2148754, at *1 (Sept. 15, 2004) (the appellant failed to demonstrate how each item she identified was proximately caused by her removal, *e.g.*, the reason she consulted doctors, the purposes of the prescription drugs purchased, and how the agency was responsible for the expenditure of the funds)). Specifically, the appellant requested \$464.04 as reimbursement for the cost of medications for acne and special shampoos for hair loss that she incurred between October 2009 and June 2010.² P-1 File, Tab 9 at 9.

¶10 In support of this request, the appellant cited her own statement and the statements of her family, friends, and minister. *Id.* The appellant claimed that

² Although the appellant asserted that she paid for the cost of treatment for uterine fibroids in June-July 2009, she did not include those costs in her pecuniary damages request. *See* P-1 File, Tab 9 at 9-10; *id.*, Subtabs 7a, 7h. She also did not request reimbursement for all of her prescription drug expenses. *See id.* at 9 n.8.

those statements connected the need for those medications to the physical effects of the stress and anxiety she suffered as a result of her removal. *Id.* The statements that the appellant cites in support of this claim consistently mention the appellant's hair loss and acne problems. *Id.*; *see id.*, Subtabs 8d at 2, 8h at 4, 8l at 2, 8m at 1. The appellant also provided a print-out of her Wal-Mart pharmacy orders for the period of April 1, 2009, to June 27, 2010. *Id.*, Subtab 7h at 1-3. Additionally, she provided Progress Notes from her dermatologist dated November 17, 2009, May 4, 2010, and August 5, 2010, in which her dermatologist indicated that the appellant suffered hair-loss and facial acne. *Id.* at 4-6.

¶11 However, the appellant's dermatologist did not indicate the cause of the appellant's conditions and did not generally indicate the extent of those conditions, except in the August 5, 2010 note, in which the dermatologist wrote that the appellant's hair and facial conditions were "mild." *Id.* at 6. Further, none of the dermatologist's notes address the extent that these conditions were either caused or exacerbated, if at all, by the agency's action. *Id.* at 4-6. Thus, even accepting the assertions of the appellant and her family, friends, and clergy that these medical conditions worsened after the agency removed her, that alone does not establish a causal connection between the agency's acts and the worsening of the appellant's conditions. *See, e.g., Collington v. U.S. Postal Service*, EEOC Appeal No. 01A03359, 2002 WL 31014618, at *3 (Aug. 30, 2002) (the fact that the conditions worsened after the discriminatory acts does not prove a causal connection between the acts and the worsening of the condition). Without medical evidence indicating that the appellant's medical conditions or the exacerbation of those conditions were caused by the agency's acts, the appellant fails to establish that she incurred the expenses in question as a result of the agency's conduct. *Id.*; *see* Guidance at *4. Thus, we agree with the administrative judge that the appellant's evidence fails to adequately connect her

acne and hair loss, and the expenses attributable to those conditions, to the agency's actions. Recommendation at 6.

¶12 As noted above, because we see no error in the administrative judge's determinations, we award the appellant \$6,463.50 in past pecuniary damages.

Nonpecuniary Damages

¶13 Nonpecuniary damages are not subject to precise quantification, and include losses related to emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. *Sloan*, 77 M.S.P.R. at 70; Guidance at *5; see *Heffernan*, [107 M.S.P.R. 97](#), ¶ 7. An award of compensatory damages for nonpecuniary losses should reflect the extent to which the agency directly or proximately caused the harm and the extent to which other factors also caused the harm. *Sloan*, 77 M.S.P.R. at 70. The award should take into account the severity and duration of the harm, although nonpecuniary damages are limited to a maximum amount of \$300,000. [42 U.S.C. § 1981a\(b\)\(3\)\(D\)](#); *Hensley v. Tennessee Valley Authority*, EEOC Appeal No. 0120072458, 2008 WL 5479223, at *5 (Nov. 10, 2008). The EEOC has stated that the amount of a nonpecuniary damage award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483, 1999 WL 139427, at *6 (Mar. 4, 1999) (citing *Cygnar v. City of Chicago*, [865 F.2d 827](#), 848 (7th Cir. 1989)).

¶14 Acceptable evidence of nonpecuniary damages may include a statement by the complainant explaining how she was affected by the discrimination. *Carle v. Department of the Navy*, EEOC Appeal No. 01922369, 1993 WL 1504728, at *4 (Jan. 5, 1993). Statements from others, including family members, friends, and health care providers may address the outward manifestations of the impact of the discrimination on the complainant. *Sinnott v. Department of Defense*, EEOC

Appeal No. 01952872, 1996 WL 546877, at *6 (Sept. 19, 1996). The complainant may also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Carle*, 1993 WL 1504728, at *4. However, evidence from a health care provider is not a mandatory prerequisite to establishing entitlement to nonpecuniary damages. *Sinnott*, 1996 WL 546877, at *6. The EEOC has recognized that an appellant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01961030, 1996 WL 637242, at *12 (Oct. 25, 1996), *recons. denied*, EEOC Request No. 05970336, 1997 WL 741259 (Nov. 20, 1997). Where a complaining party's emotional harm is due in part to personal difficulties which were not caused or exacerbated by the discriminatory conduct, the employer is liable only for the harm resulting from that conduct. *Id.* (citing *Vance v. Southern Bell Telephone and Telegraph Co.*, [863 F.2d 1503](#) (11th Cir. 1989)); Guidance at *6 (also citing *Vance*).

¶15 The appellant requested \$150,000 in nonpecuniary damages, claiming that she experienced physical, emotional, spiritual, professional, and financial harm as a result of the agency's actions. P-1 File, Tab 9 at 12-23.

¶16 Regarding her physical harm, the appellant claims that her preexisting conditions, i.e., severe allergies, chronic asthma, and bronchospasms, further deteriorated following her April 10, 2009 removal. *Id.* at 13. The exacerbation of her asthma caused her to use her Albuterol inhaler more frequently and to endure the side effects, i.e., fatigue, sluggishness, lack of energy, and sleepiness, caused by its use. *Id.* She asserts that she could no longer afford her once or twice-a-week allergy shots and instead took Zyrtec, a less expensive, but also less effective option, which produced side effects of fatigue and dizziness. *Id.*, Subtab 8b at 5. This change in allergy treatment, she claims, caused her to develop bronchitis two or three times within a year, rather than once, and that her asthma worsened. *Id.*, Subtab 8b at 1, 5. The appellant also asserts that she

could not afford a cleaning service for her home and that the dust she encountered in cleaning it herself caused extreme exhaustion, severe headaches, and more asthma/allergic-type reactions. *Id.*, Subtab 8b at 5-6. Moreover, the appellant claimed that she had trouble sleeping because she constantly worried, that her blood pressure went up, and that she had headaches and was fatigued “all the time.” *Id.* at 14, Subtab 8h at 3. As noted above, the appellant also claims hair loss, and she cites the statements of several of her friends and her clergyman in support of that assertion, in addition to some of her other assertions regarding her health. *See, e.g., id.*, Subtabs, 8c-8d, 8g, 8l-8m. She also attributes the rapid growth of her uterine fibroids to the worry and stress caused by her removal, and claims that her fibroids may interfere with having a baby in the future. *Id.*, Subtab 8h at 4. The appellant further claims that she ate all the time, purchased unhealthy food because it was cheaper, stopped exercising, and gained weight as a result of the agency’s action. *Id.* at 14-15, Subtab 8h at 3. She cites the statement of another friend in support of that assertion. *Id.*, Subtab 8k.

¶17 Regarding her emotional harm, the appellant asserts that she used to be a giving person, but that she can no longer do so. P-1 File, Tab 9 at 15, Subtab 8h at 1. She further asserts that her personality went from “very bubbly and very outspoken” to distrusting and questioning everything. *Id.* at 16, Subtab 8h at 1-2. She describes sitting home and crying, rather than going out as she had done in the past, and her reticence to invite friends and family to her home, or to attend social gatherings, because she did not want others to see her this way. *Id.* at 15-18; Subtab 8h at 2, 4. She also describes her loss of self-esteem and confidence, the despair she experienced, and the instability of her moods. *Id.* at 16-17. She asserts that instead of taking pride in her appearance, she stopped taking care of herself. *Id.* at 18. The statements of the appellant’s family, friends, and clergyman support her assertions. *E.g., id.*, Subtabs 8c-8g, 8i-8m. For example, the appellant’s sister, who lives in the area, wrote that she observed the appellant change from a confident, financially secure, well-dressed and

independent woman, to one who was unsure, financially ruined, depressed and dependent. *Id.*, Subtab 8e at 1-2. The appellant's neighbor, who saw or spoke to her "almost daily," described seeing her "reduced to just a shadow of her old self" after the agency removed her. *Id.*, Subtab 8c at 1-2. The appellant's friends also consistently describe how the appellant was an outgoing and social individual, but became socially reclusive and would not leave her home for days at a time. *E.g., id.*, Subtabs 8d at 1-2, 8j at 1, 8m at 1-2.

¶18 Regarding spiritual harm, the appellant claims that as a result of her ordeal she felt conflicted in her feelings of faith and relationship with God. P-1 File, Tab 9 at 19, Subtab 8h at 3. Nevertheless, she also claims that she drew strength from her faith during this time and compares her experience to the biblical character Job. *Id.* at 19, Subtab 8h at 5. The statements of her clergyman and some of her friends support these assertions. *Id.* at 19, Subtabs 8d-8f, 8j, 8l.

¶19 Regarding professional harm, the appellant describes the devastation and embarrassment of having to tell prospective employers that she was removed from her federal position because of health reasons. P-1 File, Tab 9 at 20, Subtab 7b at 1. She asserts that she lost years of service and describes the humiliation and hurt she experienced because her peers who started at the same time as she had progressed to management positions, one of them becoming her director. *Id.*, Subtab 7b at 1. She feels that her career was taken away from her just as it was starting to "blossom" and that her opportunities to advance in her position and be promoted have halted. *Id.*, Subtab 8h at 2-3. In this regard, we note that the appellant did find work in the interim, which served to mitigate her damages and perhaps undermine her claim of professional harm. *See id.*, Subtabs 7b at 2, 7g.

¶20 Lastly, regarding the financial harm she experienced, the appellant asserts that she went from being financially independent and providing others with help to being constantly worried because her finances were in a state of ruin. P-1 File, Tab 9 at 21-23, Subtab 7b at 1-3. She claims that she received several notices that her house was about to go into foreclosure. *Id.*, Subtab 7b at 2. The

appellant asserts that the debts she incurred caused her credit scores to drop significantly, and that she has creditors calling her daily demanding payment and leaving notices on her front door. *Id.*, Subtab 7b at 1, 3, 5-12. The appellant describes the embarrassment and humiliation she felt because she was forced to depend on the mercy of her family and friends, to whom she owes several thousand dollars. *Id.* at 3. Her sister affirms that she bought the appellant groceries and that the appellant had to borrow money for basic survival. *Id.*, Subtab 8e. The statements of the appellant's friends also support her assertions in this regard. *E.g.*, *Id.*, Subtabs 8c at 2, 8d at 1. The appellant claims that as a result of these financial difficulties, she has considered filing for bankruptcy. *Id.*, Subtab 7b at 3.

¶21 We find that the appellant established that she experienced significant physical, emotional, professional, and financial harm as a result of the agency's action, but she did not demonstrate that any of the effects of that harm were permanent, long-term, or catastrophic. Specifically, we find that the appellant showed that her preexisting medical conditions worsened as a result of her removal because, among other things, she had to forego allergy shots in favor of less-effective over the counter medication and use her inhaler more frequently. She had substantial side effects from these medications and developed bronchitis more frequently during the time following her removal. Further, we find that the appellant experienced considerable emotional distress during this time, changing from an outgoing, confident woman to one who was reclusive, distrusting, and uninterested in caring for herself or about her appearance. She also shouldered the embarrassment of telling prospective employers about her removal and may have experienced lost opportunities in her position, but the professional harm that the appellant described was also tempered by her ability to find interim employment. In addition, the appellant established that she experienced considerable financial harm as a result of her removal, requiring her to go into debt, and causing her to be threatened with foreclosure and bankruptcy. Lastly,

although the appellant claimed that she experienced spiritual harm following the agency's action, and we do not doubt the appellant's assertion, we find that she also asserted that her experience drew her closer to God and that her faith is now stronger as a result. P-1 File, Tab 9 at 19, Subtab 8h at 5. Thus, we do not find the appellant's claimed spiritual harm compensable. Based on the arbitrator's determination, and as recommended by the administrative judge, we find that the agency must compensate the appellant for the nonpecuniary losses that she incurred during the time between her April 10, 2009 removal and May 14, 2010 reinstatement. *See* Recommendation at 9 n.1; P-1 File, Tab 9, Subtab 3 at 44-45.

¶22 In her recommendation, the administrative judge correctly noted that “[i]n cases where [the] EEOC has awarded nonpecuniary damages of \$40,000 and above, the evidence has tended to show that the emotional or psychological injuries which resulted from the agency's action either had permanent or substantially long-term effects or were so catastrophic that no inquiry into long-term effects was necessary.” Recommendation at 10 (citing *Kannikal v. Department of Justice*, EEOC Appeal No. 01960146, 2001 WL 704208, at *4 (June 15, 2001)). After considering the appellant's request, the administrative judge found that the statements that the appellant submitted in support of her request were not sufficient to meet the EEOC's criteria for such an award. *Id.* The appellant asserted that the harm caused by the agency's action continues. *See* P-1 File, Tab 12 at 3. There is nothing in the record, however, to suggest any of the effects she ascribed to her removal are permanent, substantially long-term, or so catastrophic that long-term effects could be presumed. Thus, we agree with the administrative judge's assessment of the appellant's evidence. Recommendation at 10.

¶23 Citing the Board's determination in *Heffernan* that a “primary factor” in its award of \$25,000 in nonpecuniary damages was the fact that the agency's discrimination lasted for about 2½ years, the administrative judge concluded that the instant appellant is entitled to \$10,000 in nonpecuniary damages.

Recommendation at 10 (citing *Heffernan*, [107 M.S.P.R. 97](#), ¶ 14). More completely stated, the Board found in *Heffernan* that “the appellant experienced serious emotional harm as a result of the agency’s discrimination for a period of about 2½ years.” *Heffernan*, [107 M.S.P.R. 97](#), ¶ 14. The appellant does not dispute that the harm caused by the agency action is limited to the time of her removal, although, as noted above, the appellant asserted below that the harm she experienced continues “to this day.” P-1 File, Tab 12 at 3. Nevertheless, the pertinent time period in this matter, as found by the arbitrator, began with the appellant’s April 10, 2009 removal and ended with the arbitrator’s May 14, 2010 decision ordering her reinstatement, a duration of just over 1 year. *See* Recommendation at 9, n.1; P-1 File, Tab 9, Subtab 3 at 44-45.

¶24 The EEOC has awarded nonpecuniary damages in other cases involving the physical and emotional harm caused by the exacerbation of a pre-existing asthma condition. *Collington*, 2002 WL 31014618, at *3-4 (\$15,000); *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652, 1995 WL 434072, at *9 (July 17, 1995) (\$75,000). In this matter, the appellant’s damages do not come close to those found by the EEOC in *Carpenter*. For example, the duration of the compensable harm in that case was approximately 2 years,³ and included, among other things, loss of consortium, thoughts of suicide, panic attacks, and other psychiatric issues. *Carpenter*, 1995 WL 434072, at *1, *5-7. Additionally, the complainant in *Carpenter* experienced more severe stress-related conditions including digestive problems, internal bleeding, Nerve Ending Dermatitis, and hives. *Id.* at *5-7. Thus, as noted above, we agree with the administrative judge’s analysis that the appellant failed to establish the sort of harm found in cases with awards of \$40,000 and above. *See* Recommendation at 10. The

³ Although the compensable harm actually occurred between 1988 and 1993, much of it pre-dated the enactment of the Civil Rights Act of 1991, and accordingly, the EEOC limited his damages to those incurred after the Act. *Carpenter*, 1995 WL 434072, at *5, *8-9.

damages present in the instant matter appear to more closely compare with those found in the *Collington* case, although the time period there, approximately 6 months, was about half that involved in the instant matter, and the appellant in that case was hospitalized. *Collington*, 2002 WL 31014618, at *3-4 (Ms. Collington experienced aggravation of her preexisting asthma, difficulty breathing, tightness in her chest, pain, elevated blood pressure, stress, and anxiety).

¶25 The degree, type, and, to a lesser extent, the duration of the emotional harm alleged in this matter are comparable to those asserted in cases awarding nonpecuniary damages in amounts both larger and smaller than the amount recommended by the administrative judge in this matter. *See, e.g., Barrington v. U.S. Postal Service*, EEOC Appeal No. 0120101822, 2011 WL 764642, at *1-2, *6 (Feb. 23, 2011) (\$25,000 in nonpecuniary damages were awarded for stress, anxiety, depression, social withdrawal, embarrassment, and physical pain associated with the exacerbation of existing medical conditions lasting just over 1 year); *Logan v. Department of the Interior*, EEOC Appeal No. 0720060093, 2007 WL 2693756, at *1, *4 (Sept. 10, 2007) (\$10,000 in nonpecuniary damages were awarded for a 3-year period of emotional harm, stress and anxiety associated with exacerbation of existing medical conditions); *Caros v. Department of Homeland Security*, EEOC Appeal No. 07A30094, 2004 WL 368016, at *2-4 (Feb. 19, 2004) (\$10,000 in nonpecuniary damages were awarded for a 2½ year period of low self-esteem, depression, and anxiety associated with exacerbation of existing medical conditions); *Batieste v. Department of the Air Force*, EEOC Appeal No. 01974616, 2000 WL 731990, at *5-6, n.6 (May 26, 2000) (\$12,000 in nonpecuniary damages were awarded for depression, isolation, anxiety, and insomnia experienced over a 21-month period due to the agency's discriminatory termination).

¶26 As noted above, the EEOC awarded greater damages in *Collington*, 2002 WL 31014618, at *3-4 (\$15,000 for 6 months of harm). In that case, the

respondent's existing medical condition, asthma, was the same as the appellant's in this case, but the emotional harm that Ms. Collington experienced was of shorter duration and somewhat greater intensity due to the fact that she was hospitalized. *See id.* The EEOC also recently awarded greater damages in *Barrington*, 2011 WL 764642, at *1-2, *6 (\$25,000 for just over 1 year of harm). That case involved somewhat similar emotional harm over a nearly identical duration to the instant matter, but involved the exacerbation of a different medical condition, fibromyalgia. *See id.* Thus, recognizing that nonpecuniary damages are not subject to precise quantification, *e.g.*, *Heffernan*, [107 M.S.P.R. 97](#), ¶ 7, and considering all of the circumstances set forth above and in the cited cases, we find that the appellant is entitled to nonpecuniary damages in the amount of \$15,000.

ORDER

¶27 We ORDER the agency to issue a check to the appellant for compensatory damages in the amount of \$21,463.50, representing \$6,463.50 in past pecuniary damages and \$15,000.00 in nonpecuniary damages. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶28 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶29 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not

fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶30 This is the final decision of the Merit Systems Protection Board on the appellant's request for arbitration review and request for compensatory damages. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the Clerk of the Board.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your request for compensatory damages. See Title 5 of the United States Codes, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#); [5 C.F.R. § 1201.204\(i\)](#)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.